Ng Kon Yu v Sakim bin Saiking & Ors

HIGH COURT (SANDAKAN) — SUIT NO 22–86 OF 2002
LINTON ALBERTJ
28 FEBRUARY 2006

Land Law — Indefeasibility of title and interests — Land Ordinance (Sabah Cap 68) — Whether prior rights of licence and native customary rights subsisted upon issuance of title to registered owner — Sabah Land Ordinance s 88

Land Law — Indefeasibility of title and interests — Registered owner — Whether prior rights of licence and native customary rights subsisted upon issuance of title to registered owner — Sabah Land Ordinance s 88

Native Law and Custom — Land dispute — Customary rights over land — Entry and enjoyment of land encouraged by government — Whether licence to remain indefinitely on land — Whether native customary rights subsisted upon issuance of title to plaintiff — Sabah Land Ordinance s 88

The plaintiff was the registered owner of three parcels of alienated land ('the land'). The defendants in the three consolidated suits were variously in occupation of the land. The defendants had planted crops on the land and were gainfully reaping the fruits of oil palm which they have planted since the mid-1980s. The defendants claimed that their initial entry on the land in the 1970s was encouraged by the Government under the Luang Manis Smallholders' Scheme. The defendants' enjoyment of the land had been long and uninterrupted until the plaintiff were issued draft titles to the land in 1995 and 1996 and subsequently became the registered owner in 1998.

The defendants had all refused to vacate the land. They had in 1999 suceeded in resisting the plaintiff's application for possession under O 89 of the Rules of the High Court 1980 ('the OS application'). The plaintiff now sought the same relief including a restraining order and damages for trespass, his notice to quit issued by his solicitors on 10 June 2002 having been ignored yet again by the defendants.

It was contended for the defendants that they have at the very least a licence to remain indefinitely on the land; alternatively, they could not be dislodged from the

land because they have acquired native customary rights over it by virtue of s 15 of the Land Ordinance. A

Held, allowing the plaintiff's claim: B

(1) In accordance with s 88 of the Land Ordinance, the licence and the native customary rights which the defendants had allegedly acquired could not, therefore, conceivably subsist upon issuance of the titles to the land in 1995 and 1996. The clear and unambiguous words used in s 88 render any claim to or interest in the land invalid (see para 3). C

(2) The plaintiff's title to the land could not be defeated by the defendants' claim to or interest in it on the strength of nebulous arguments relating to what the Assistant Collector of Land Revenue did or did not do prior to the issuance of the relevant titles, as required under the provisions of the Land Ordinance. In any event, these matters were not pleaded in the statements of defence and must, therefore, be disregarded; and, for the same reason, the arguments relating to adverse possession were not relevant for determining the present case although in Sabah, the doctrine of adverse possession could be invoked against private owners of land. There was also totally no merit in the plea of limitation because the plaintiff's action was commenced well within the limitation period of 12 years. The plaintiff's failure to obtain possession of the land under the OS was of no assistance to the defendants on the plea of res judicata because it was not suggested that the issues here had been determined in the OS application. The defendants' reliance on the concept of legitimate expectation was not totally unfounded but this was a matter which this court was not concerned with here because the plaintiff was obviously not the appropriate party against whom this could be directed at (see para 5). D E F

[Bahasa Malaysia summary

Plaintif merupakan pemilik berdaftar tiga keping tanah bermilik ('tanah tersebut'). Defendan-defendan dalam tiga guaman yang disatukan telah menetap atas tanah tersebut. Defendan-defendan telah bercucuk tanam atas tanah tersebut dan mendapat hasil daripada kelapa sawit yang mereka tanam sejak pertengahan tahun 1980an. Defendan-defendan mendakwa bahawa kemasukan awal mereka atas tanah tersebut sekitar tahun 1970an digalakkan oleh Kerajaan di bawah Skim Pekebun Kecil Luang Manis. Kesenangan defendan-defendan atas tanah tersebut selama ini tidak terganggu sehingga plaintif mengeluarkan draf hak milik-hak milik tanah tersebut pada tahun 1995 dan 1996 dan kemudiannya menjadi pemilik berdaftar pada tahun 1998. G H

Defendan-defendan semuanya enggan untuk keluar daripada tanah tersebut. Mereka telah pada tahun 1999 berjaya menghalang permohonan plaintif untuk pemilikan di bawah A 89 Kaedah-Kaedah Mahkamah Tinggi 1980 ('permohonan SP'). Plaintif sekarang memohon relif yang sama termasuklah satu perintah sekatan dan ganti rugi untuk pencerobohan, notis beliau untuk keluar yang dikeluarkan oleh peguamnya pada 10 Jun 2002 telah tidak diambil peduli sekali lagi oleh defendan-defendan. I

A Ia telah dihujahkan bagi pihak defendan-defendan bahawa mereka sekurang-kurangnya mempunyai lesen untuk kekal atas tanah tersebut untuk tempoh masa yang tidak pasti; secara alternatifnya, mereka tidak boleh diusir keluar daripada tanah tersebut kerana mereka telah memperoleh hak adat anak watan ke atasnya menurut s 15 Ordinan Tanah.

B

Diputuskan, membenarkan tuntutan plaintif:

(1) Menurut s 88 Ordinan Tanah, lesen dan hak adat anak watan yang mana defendan-defendan katakan telah d iperoleh tidak boleh, oleh demikian, terus C wujud dengan pengeluaran hak milik-hak milik tanah tersebut pada tahun 1995 dan 1996. Perkataan-perkataan yang jelas dan tak taksa yang digunakan dalam s 88 menyebabkan apa-apa tuntutan terhadap atau kepentingan ke atas tanah tersebut tidak sah (lihat perenggan 3).

D (2) Hak milik plaintif ke atas tanah tersebut tidak boleh dikalahkan oleh tuntutan defendan-defendan terhadap atau kepentingan dalamnya berdasarkan hujah yang tidak jelas berkaitan apa yang Timbalan Pemungut Cukai Tanah laku atau tidak lakukan sebelum pengeluaran hak milik-hak milik berkaitan, seperti yang dikehendaki di bawah peruntukan-peruntukan Ordinan Tanah. Dalam apa E keadaanpun, perkara-perkara tersebut tidak diplidkan dalam penyataan pembelaan dan hendaklah, oleh itu, tidak dihiraukan; dan, bagi sebab sama, hujah-hujah berkaitan pemilikan yang bertentangan tidak relevan untuk menentukan kes semasa meskipun di Sabah, doktrin pemilikan bertentangan boleh digunakan terhadap pemilik swasta tanah tersebut. Juga tidak terdapat merit dalam pli had masa kerana tindakan plaintif telah dimulakan dalam F tempoh had masa 12 tahun. Kegagalan plaintif untuk memperoleh pemilikan tanah tersebut di bawah SP tidak membantu defendan-defendan atas pli res judicata kerana ia mencadangkan bahawa persoalan-persoalan di sini telah diputuskan dalam permohonan SP. Defendan-defendan yang bergantung kepada konsep jangkaan munasabah tidak berasas tetapi ini adalah satu perkara G yang mahkamah ini tidak pentingkan di sini kerana plaintif dengan jelas bukan pihak yang sesuai yang boleh diarahkan (lihat perenggan 5).]

Notes

For a case on Land Ordinance (Sabah Cap 68), see 8(2) *Mallal's Digest* (4th Ed, 2003 Reissue) para 2697.

H For cases on customary rights over land see 10 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 632–639.

For cases on registered owner, see 8(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2707–2709.

I **Cases referred to**

Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd [1996] 2 MLJ 12 (refd)

Nik Ibrahim bin Abdul Rahman & Anor v Pentadbir Tanah Jajahan Gua Musang & Ors [2001] 5 MLJ 59 (refd)

Legislation referred to

Land Ordinance (Sabah Cap 68) ss 15, 87, 88
Rules of the High Court 1980 O 89

Edwin Tsen (Catherine Voo with him) (Tan Pang Tsen & Co) for the plaintiff.
Martin Idang (Maijol Mahap with him) (Mahap Jelani & Co) for the defendant.

Linton Albert J:

[1] The plaintiff is the registered owner of three parcels of alienated land at Luang Manis in the district of Labuk/Sugut (the said land). The defendants in the three consolidated suits are variously in occupation of the said land. The defendants have planted crops on the said land and are gainfully reaping the fruits of oil palm which they have planted since the mid-1980s. The defendants have all refused to vacate the said land. They had in 1999 suceeded in resisting the plaintiff's application for possession under O 89 of the Rules of the High Court 1980 in Originating Summons No S24–25 of 1999 ('the OS'). The plaintiff is now seeking the same relief including a restraining order and damages for trespass, his notice to quit issued by his erstwhile solicitors on 10 June 2002 having been ignored yet again by the defendants.

[2] The defendants' response to the plaintiff's claim set out in the respective statements of defence are identical. I do not find it either useful or necessary to deal exhaustively with the matters disclosed in the statements of defence or the evidence adduced by the defendants to establish them, the salient aspects of which are these: the initial entry by the defendants on the said land in the 1970s was encouraged by the Government under the Luang Manis Smallholders' Scheme, their occupation and cultivation of the said land have remained uninterrupted since then, there was nothing in the responses to their applications for the said land to suggest that their applications would not be considered favourably, judging from correspondences from the relevant authorities including the Assistant Collector of Land Revenue, Beluran. The defendants' enjoyment of the said land had been long and uninterrupted but unbeknown to them the draft titles to the said land were issued in 1995 and 19% to other competing applicants and the rude awakening came soon after the plaintiff became the registered owner in 1998. It was contended for the defendants that on the facts established, they have at the very least a licence to remain indefinitely on the said land; alternatively, they cannot be dislodged from the said land because they have acquired native customary rights over it by virtue of s 15 of the Land Ordinance. The short answer to that is s 88 of the Land Ordinance of the Land Ordinance which by virtue of s 87 'applies to all dealings'. Section 88 states:

> No new title and no dealing with, claim to or interest in any land except land still held under native customary tenure without documentary title shall be valid until it has been registered in accordance with the provisions of this Part.

[3] The licence and the native customary rights which the defendants have allegedly acquired cannot, therefore, conceivably subsist upon issuance of the titles to the said land in 1995 and 1996. The clear and unambiguous words used in s 88 render any claim to or interest in the said land invalid. *Borneo Housing Mortgage*

Finance Bhd v Time Engineering Bhd [1996] 2 MLJ 12, is, in my view, authority for that proposition. This is what Edgar Joseph Jr FCJ, delivering the grounds of judgment of the Federal Court said at p 26:

> However, s 88 which emphasizes the paramount importance of registration in accordance with Pt V of the Land Ordinance as a condition precedent for the recognition of the validity of title or dealing or claim to or interest in any land (except land still held under native customary tenure without documentary title) does, In our view, imply the basic Torrens concept that title to or interest in land vests and divests only upon registration.

[4] On the other hand, I do not think the passage relied on by the defendants at p 24 is of any assistance to the defendants. It reads:

> Nowhere in the Land Ordinance is there any provision conferring indefeasibility of title to or interest in land which is a feature of central importance to the Torrens system of land registration. This is to be contrasted with the position in Peninsular Malaysia and Sarawak, where there are express provisions conferring such indefeasibility.

[5] The plaintiff's title to the said land cannot be defeated by the Defendants' claim to or interest in it on the strength of nebulous arguments relating to what the Assistant Collector of Land Revenue did or did not do prior to the issuance of the relevant titles, as required under the provisions of the Land Ordinance. In any event, these matters are not pleaded in the respective statements of defence and must, therefore, be disregarded; and, for the same reason, the arguments relating to adverse possession are not relevant for determining the present case although in Sabah, the doctrine of adverse possession can be invoked against private owners of land (see *Time Engineering*. There is also totally no merit in the plea of limitation because the plaintiff's action was commenced well within the limitation period of 12 years. The plaintiff's failure to obtain possession of the said land under the OS is of no assistance to the defendants on the plea of res judicata because it is not suggested that the issues here have been determined in the OS application. If it is of any comfort to the defendants, I find that their reliance on the concept of legitimate expectation is not totally unfounded but this is a matter which we are not concerned with here because they are barking up the wrong tree — the plaintiff is obviously not the appropriate party against whom this can be directed at.

[6] The law can be harsh on litigants and as trespassers the consequence to the defendants shall be the same as ordered against the plaintiffs in *Nik Ibrahim bin Abdul Rahman & Anor v Pentadbir Tanah Jajahan Gua Musang & Ors* [2001] 5 MLJ 59 at p 63:

> The plaintiffs cannot exercise any right whatsoever over the crops (ie bananas and rubber) which they planted on the land. Everything planted in the soil belong to the soil. *Quicquid plantatur solo cedit solo.* Whatever is natural to the soil, or planted there either for ornament or use, which is intended to be permanent, goes with the soil; the owner of the soil is the owner of everything planted in it. In the instant case, all that are planted in the said land belonged to the registered proprietor, unless there is evidence to the contrary, for example, the proprietor of the land allows the plaintiffs to remain, to reap what they have sown or planted. There Is no such evidence that they had been allowed to remain on the said land to harvest the cash crops.

[7] The plaintiff did not, however, adduce evidence nor pursue that aspect of his claim relating to damages.

[8] For the reasons I have stated, I allow the plaintiff's claim asked for in prayers 1, 2 and 3 in each of the respective statements of claim and make the following orders:

(1) the defendants shall give up possession of the said land to the plaintiff within 90 days from today with the consequential modification to prayers 1 and 2;

(2) the defendants in each of the suits shall pay the plaintiff nominal damages for trespass in the sum of RM10;

(3) costs to the plaintiff to be taxed unless agreed.

[9] Order accordingly.

Plaintiff's claim allowed.

Reported by Loo Lai Mee